

The opinion in support of the decision being entered today was *not* written for publication in a law journal and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte IAN BAIRD-SMITH, ANDREAS ZIEGLER,
REINHART GEISLER, and WERNER HAMMON

Appeal 2007-0891
Application 09/445,043
Technology Center 3700

Decided: April 23, 2007

Before ANITA PELLMAN GROSS, JENNIFER D. BAHR, and STUART S. LEVY, *Administrative Patent Judges*.

GROSS, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Baird-Smith, Ziegler, Geisler, and Hammon (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1, 3, 4, 6, 8 through 11, and 13. Claims 2, 5, 7, and 12 have been canceled, and claims 14 through 22 have been withdrawn from consideration.

Appellants' invention relates to a closure for an open-ended container.

Claim 1 is illustrative of the claimed invention and reads as follows:

1. A container assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising:
 - (i) a flexible membrane for closing the open end of the container;
 - (ii) an adhesive seal between the flexible membrane and the container;
 - (iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;
 - (iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and
 - (v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.¹

¹ We note that nothing in claim 1 defines the maximum possible extension of the flexible membrane, such as the bursting point. As written, the last paragraph of claim 1 is internally inconsistent. When the laminar member is close enough that the flexible membrane will not burst, the laminar member defines the maximum possible extension of the flexible membrane. However, if it defines the maximum possible extension, how can it be

The prior art reference of record relied upon by the Examiner in rejecting the appealed claims is:

Hiroshi JP 6-219464 Aug. 09, 1994

Claims 1, 3, 4, 6, 8 through 11, and 13 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hiroshi.

We refer to the Examiner's Answer (mailed June 16, 2006) and to Appellants' Brief (filed March 27, 2006) and Reply Brief (filed August 18, 2006) for the respective arguments.

SUMMARY OF DECISION

As a consequence of our review, we will reverse the obviousness rejection of claims 1, 3, 4, 6, 8 through 11, and 13.

OPINION

Appellants contend (Br. 16-19) that the Examiner has applied impermissible hindsight in determining that the claimed spacing between the laminar member and the flexible membrane in Hiroshi would have been obvious. We agree for the reasons stated *infra*.

The Examiner admits (Answer 3) that "Hiroshi is silent regarding the spacing between the laminar member and the flexible membrane." The Examiner asserts (Answer 3) that it would have been obvious to limit the spacing between the laminar member and the flexible membrane to "less

spaced a distance less than the maximum possible extension of the flexible membrane? For the purposes of this appeal, we have interpreted the phrase "maximum possible extension" to mean the maximum before bursting.

than the maximum possible extension of the deformable member towards the laminar member to prevent rupture of the flexible member due to excessive pressure within the closed can and to limit the stress placed on the peel seal for limiting the possibility of its failure."

Appellants disclose (Specification 11:1-7) that the membrane 11 expands during cooking of food inside the can. Further, Appellants state (Specification 12:10-14) that the presence of the circular disk portion 21 of the rigid cap 12 "prevents rupture of membrane 11" when pressure is generated during cooking. The laminar member recited in claim 1 is applied to the side of the rigid cap facing the flexible membrane. Thus, Appellants disclose that the rigid cap with the laminar member prevents rupture of the flexible membrane when the flexible membrane expands from pressure built up inside the can during cooking. The Examiner's rationale for modifying Hiroshi sounds much like Appellants' disclosure.

The Examiner provides no evidence to support the assertion that the claimed spacing would have been obvious. The Federal Circuit has stated:

To reach a non-hindsight driven conclusion as to whether a person having ordinary skill in the art at the time of the invention would have viewed the subject matter as a whole to have been obvious in view of multiple references, the Board must provide some rationale, articulation, or reasoned basis to explain why the conclusion of obviousness is correct ... [R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.

In re Kahn, 441 F3d 977, 987-88, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006). Clearly, the Court's reasoning applies to modifications of a reference as well

as to combinations of two references. As the Examiner has provided only conclusory statements with no reasoning or evidence to support the conclusion of obviousness, the Examiner has engaged in impermissible hindsight.

The Examiner (Answer 4-5) also argues that the drawings, though not drawn to scale, show a small spacing and, therefore, "reasonably disclose and suggest" to the skilled artisan a spacing less than the maximum possible extension of the flexible membrane towards the laminar member. However, as explained by Appellants (Reply Br. 6), since the drawings are not drawn to scale, one cannot determine any details about the spacing except that a space exists. Therefore, the drawings do not suggest the claimed spacing. Accordingly, we cannot sustain the obviousness rejection of claims 1, 3, 4, 6, 8 through 11, and 13 over Hiroshi.

ORDER

The decision of the Examiner rejecting claims 1, 3, 4, 6, 8 through 11, and 13 under 35 U.S.C. § 103 is reversed.

REVERSED

JRG

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